IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	No. SC 85304
ANGELA COFFEL,	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI
FORTY-FIFTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE PATRICK S. FLYNN, JUDGE

APPELLANT'S REPLY BRIEF

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CASES:

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

Ms. Coffel incorporates the jurisdictional statement set out on page 7 of her initial substitute brief.

STATEMENT OF FACTS

Ms. Coffel incorporates the statement of facts set out on pages 8 through 40 of her initial brief.

POINTS RELIED ON[1]

I.

The trial court erred and abused its discretion when it entered judgment against Coffel without first considering whether, as a result of a mental abnormality she had serious difficulty in controlling her behavior, as required by law. Coffel was prejudiced by the trial court's error because there is no indication in the record that the court specifically found that Coffel had serious difficulty in controlling her sexually violent behavior, which is a necessary predicate to finding her to be a SVP. The judgment is therefore the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse and remand for a new trial.

In re the Care and Treatment of Spencer, 103 S.W.3d 407**,** (Mo. App., S.D. 2003);

State v. Neiderstadt, 66 S.W.3d (Mo banc 2002)

Thomas v. State, 74 S.W.3d 789 (Mo. banc 2002);

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[1] Ms. Coffel will reply only to Points I and III of Respondent's brief.

United States Constitution, Fifth, Sixth, Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a).

III.

The trial court erred when it entered judgment against Coffel because the ruling was against the weight of the evidence. The overwhelming weight of the evidence in this case showed that while Coffel suffered from personality disorders, she did not meet the statutory criteria of a SVP, and the weight of the evidence with regard to risk of reoffense showed that she had a miniscule chance of reoffending in a sexually violent manner. Coffel was prejudiced by the trial court's error because the state simply failed to demonstrate that Coffel met the criteria of a SVP. The judgment is therefore not based upon substantial evidence, is against the weight of the evidence, and/or the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court

must reverse the judgment of the probate court and release Ms. Coffel from confinement.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

In Re The Detention of Thorell, 72 P.3d 708 (Wash. 2003);

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1990 (1983);

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976);

United States Constitution, Fifth, Sixth, Fourteenth Amendments;

Missouri Constitution, Article I, Sections 10, 18(a).

ARGUMENT

I.

The trial court erred and abused its discretion when it entered judgment against Coffel without first considering whether, as a result of a mental abnormality she had serious difficulty in controlling her behavior, as required by law. Coffel was prejudiced by the trial court's error because there is no indication in the record that the court specifically found that Coffel had serious difficulty in controlling her sexually violent behavior, which is a necessary predicate to finding her to be a SVP. The judgment is therefore the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse and remand for a new trial.

In spite of the State's suggestion to the contrary, ***In the Matter of the Care and Treatment of Spencer***, 103 S.W.3d 407 (Mo. App., S.D. 2003), is precisely on point with the issue raised here.

The State initially attempts to distinguish ***Spencer*** by arguing, "the Southern District expressly stated that 'it did not accept that *Crane* mandated a court to make a separate and specific lack of control determination….' *Id.* at 417. Instead, the Court simply remanded the case because 'we will not penalize the State for any failure to offer evidence showing that Appellant has serious difficulty in controlling his sexual behavior.' *Id.* at 416." (Resp. Br. 21-22). The Southern District was, in fact, explaining why it chose one of the appellant's alternative requests for relief, remand and a new trial, rather than the other, a reversal and discharge for insufficient evidence. ***Id***., at 416.

It is true that the Southern District believed that it was advisable, though not necessary, for the trial court to make a specific finding on whether there was serious difficulty controlling behavior. ***Id***., at 417. But the State has overlooked what the Southern District went on to say immediately thereafter: "… a court must determine the individual lacks control while looking at the totality of the evidence." ***Id***. Ms. Coffel brings this to the Court's attention for two reasons. First, it must be apparent even without a specific finding that a determination has been made on the issue of lack of control. Second, it demonstrates that the standard of review the State wants this Court to apply is wrong. The State claims: "'The Court examines the evidence and inferences in the light most

favorable to the verdict, ignoring all contrary evidence and inferences.' [*State v.*] *Niederstadt*, 66 S.W.3d [12] at 14. [(Mo. banc 2002)]." (Resp. Br. 18). As this Court noted in ***Neiderstadt***, that standard applies to "reviewing the sufficiency of the evidence in a court-tried *criminal* case…." ***Id***., at 13 (emphasis added). The question before this Court in this civil case must be considered "while looking at the totality of the evidence." ***Spencer***, 103 S.W.3d at 417.

The State erroneously argues:

> Thus, the *Spencer* case in no way supports the Appellant's argument. *Spencer* unequivocally states that a finding on the issue of control is not necessary in a court-tried case, and simply supports the legal and rational presumption that when an issue is litigated and contested by the parties, a verdict in favor of one party means the court found that party's evidence credible.

(Resp. Br. 22). That assertion is diametrically opposed to the most salient holding of the Southern District Court of Appeals in ***Spencer***:

> [W]e agree with the standard as stated in jury trials concerning the correct application of *Thomas*, that regardless of whether there was sufficient evidence, if the issue is contested, a new trial is required so as to properly instruct the jury.

103 S.W.3d at 416-417. The Southern District applied this same requirement to a court-tried case.

The State's assertion that Ms. Coffel is asking this Court to "assume that the trial judge did not follow the law" (Resp. Br. 15), could not be further from the truth. Ms. Coffel presumes that the probate court did follow the law, the law at the time of trial but that has since been held to be deficient.

Dr. Phenix asserted that Ms. Coffel's borderline personality disorder and antisocial personality disorder resulted in absolutely no volitional control (Tr. 360-361). Dr. Maskel questioned the degree to which the disorder impaired Ms. Coffel's volitional control (Tr. 409-410). She completely disagreed with Dr. Phenix's conclusion that Ms. Coffel had no control over her behavior as a result of the disorder (Tr. 410). Dr. Maskel thought that the disorder might cause some volitional impairment, but not a large impairment (Tr. 412). The doctor testified that what impairment might exist was not enough to fit the statutory definition (Tr. 412).

The State asked Dr. Maskel in cross-examination where she found in the Missouri statute a requirement that the mental abnormality have a "substantial impact" on volitional control (Tr. 426). Dr. Maskel answered that the statute "does not give us any direction on quantification." (Tr. 426). The State

responded, "Does not the definition of mental abnormality, under Missouri law, require the mental abnormality to affect the emotional or volitional capacity?" (Tr. 426). Dr. Maskel agreed that is what the statute says (Tr. 426). The State then repeatedly questioned Dr. Maskel about the definition requiring only an "affect" on volitional control, not a substantial impact (Tr. 426). Dr. Maskel continued to answer that the quantity of affect was not defined, and Ms. Coffle's disorder did not cause a substantial impact on her volitional control (Tr. 426-427).

The State referred to the statutory definitions during closing argument and trusted the probate court to apply those statutes to the case:

> I'm not going to argue the statute with the Court. Some of the witnesses had various interpretations, and I am very confident that the Court will look at the statute, know what is required and not required....

(Tr. 529).

The State sought to establish through its cross-examination of Dr. Maskel that the statute was satisfied by any affect on volitional control, and that a "substantial impact" on volitional control was not statutorily required. The State trusted the probate court to follow the standard set out in the statute. It reminds this Court that the probate court is presumed to have followed the law (Resp. Br. 15). But as we have learned from this Court since Ms. Coffel's trial, "any" affect

on volitional control is not enough, and serious difficulty with volitional control, or perhaps what might be described as a "substantial impact" on volitional control, is required. ***Thomas v. State***, 74 S.W.3d 789 (Mo. banc 2002). It spite of its argument to the contrary, even the State's presumption must be that the probate court applied the deficient law.

The judgment of the probate court must be reversed and the cause remanded for a new trial.

III.

The trial court erred when it entered judgment against Coffel because the ruling was against the weight of the evidence. The overwhelming weight of the evidence in this case showed that while Coffel suffered from personality disorders, she did not meet the statutory criteria of a SVP, and the weight of the evidence with regard to risk of reoffense showed that she had a miniscule chance of reoffending in a sexually violent manner. Coffel was prejudiced by the trial court's error because the state simply failed to demonstrate that Coffel met the criteria of a SVP. The judgment is therefore not based upon substantial evidence, is against the weight of the evidence,

and/or the result of misapplication of the law. As a result, the trial court denied Coffel her rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse the judgment of the probate court and release Ms. Coffel from confinement.

The State seeks to apply the wrong standard of review to this Point as well. While acknowledging the civil nature of this case, the State relies on its obligation to prove its case at trial beyond a reasonable doubt to suggest that review should be had as if this were a criminal trial (Resp. Br. 28-29). By citing to criminal cases, the State seeks to have this Court disregard vast amounts of evidence presented at the trial.

This case remains civil even thought the State is required to prove its allegations by the highest standard of proof. This is made clear by ***Kansas v. Hendricks***, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Hendrix argued that the use of procedural safeguards traditionally found in criminal trials made the SVP proceeding criminal rather than civil. 521 U.S. at 364; 117 S.Ct. at 2083. The Court rejected that argument because the decision to provide some of the

safeguards applicable to criminal trials cannot itself turn these proceedings into criminal prosecutions. ***Id***. As more fully explained by Justice Breyer in his dissent, the presence of criminal law-type procedures, such as requiring proof beyond a reasonable doubt, do not establish that the act imposes criminal punishment. 521 U.S. at 380; 117 S.Ct. at 2091. "Those procedures can serve an important purpose that in this context one might consider noncriminal, namely, helping to prevent judgmental mistakes that would wrongfully deprive a person of important liberty." ***Id***.

The Missouri legislature's requirement that the State prove its allegations beyond a reasonable doubt simply reflects the higher level of proof expected before Ms. Coffel is deprived of her liberty. It does not alter the civil nature of this proceeding. Because this case remains civil, the standard of appellate review typical in civil cases applies. This Court must reverse the judgment of the probate court if there is no substantial evidence to support it, or if it is against the weight of the evidence. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court is not required to disregard all evidence contrary to the judgment.

There is a valid, and logical, reason for reviewing the judgment for substantial supporting evidence and whether it is against the total weight of the evidence. The purpose of a criminal case is to determine the existence of a

historical fact: did the defendant commit the acts alleged. If any admissible evidence establishes those acts, that is enough. But the purpose of the State's proceeding against Mr. Coffel is not to determine the existence of a historical fact. The purpose is to predict the future: the likelihood of the occurrence of specific acts that have not yet taken place. This purpose cannot be adequately served by disregarding vast amounts of evidence. To serve this purpose the judgment must be viewed against the weight of all of the evidence.

The State summarizes in a list of ten items the evidence it believes supports Ms. Coffel's confinement (Resp. Br. 29-30). Initially, Ms. Coffel needs to correct some misstatements of the evidence in the State's list. The third item listed by the State is allegedly that Ms. Coffel "has refused all offers of treatment" (Resp. Br. 29). The State cites page 123 of the transcript in support of this assertion (Resp. Br. 29). Ms. Davin's answer on that page to the State's question was: "I have not seen treatment of meritorious treatment. [sic]" This is a far cry from establishing that Ms. Coffel "refused all offers of treatment." In fact, Ms. Coffel completed Phase I of MOSOP, and admitted that she voluntarily withdrew from Phase II (Tr. 150). But she requested in writing on November 3, 1998, to re-enter Phase II, a claim she supported with an exhibit bearing the signature of the MOSOP director (Tr. 167). She was refused entry back into

Phase II because she was too close to her outdate of July 31, 2000 (Tr. 151, 167, L.F. 7).

Item number six on the State's list is that Ms. Coffel had eighty-eight conduct violations in DOC, "many involving sexual misconduct." (Resp. Br. 29). One citation in support of this assertion is to page 55 of the transcript. On that page, a DOC guard testified that Ms. Coffel pressed herself against him during an inmate transfer (Tr. 55). The guard did write up a violation against Ms. Coffel for sexual misconduct, but she was actually disciplined for disobeying the guard's order to step away from him (Tr. 56, 60-61). The State also supports its assertion with a citation to pages 65 to 68 of the transcript (Resp. Br. 29). But the violations described on pages 65 and 66 of the transcript were for disobeying an order, violating cubicle restriction, and being out of bounds (Tr. 65-66). The State is apparently relying on the fact that Ms. Coffel was in someone else's cubicle at 12:55 a.m. (Tr. 66) to suspect that Ms. Coffel was involved in sexual misconduct, even though there was no testimony to that effect. The other transcript citations offered by the State demonstrate at most five violations for sexual misconduct. Really though, it is unnecessary to the outcome of this case for Ms. Coffel to quibble with the State whether five, six, or seven of eighty-eight conduct violations are "many."

The outcome of this case is determined by admissions made by Ms. Davin and Dr. Phenix. With the exceptions described above, the evidence summarized in the State's list and set out elsewhere in Section B of it's Point III are the things Ms. Davin and Dr. Phenix relied upon to opine that Ms. Coffel was a sexually violent predator. And yet, Ms. Davin admitted, "I am not aware of a body or research specific to female sex offenders with risk of reoffense," and "[w]e have no way of knowing or no idea whether those characteristics [common to female sex offenders] have anything to do with whether a person will sexually violently reoffend;" and Dr. Phenix admitted, "So I think it is premature to make a judgment of how accurate we are with females." (Tr. 118, 138, 390). By admitting that it is unknown whether the factors relied upon by the witnesses, and by the State, will accurately predict Ms. Coffel's risk of reoffending, it is impossible to conclude that this evidence proves *beyond a reasonable doubt* that Ms. Coffel will engage in predatory acts of sexually violence if she is not confined in a secure facility. This is the State's burden. By the admission of its own witnesses it has failed to meet it.

On page 32 of its brief, the State claims:

> And contrary to the assertion that no one has done any research to identify what factors lead female sex offenders to reoffend, the State

presented the testimony of Dr. Patricia Davin who wrote a book identifying the characteristics of the "independent female offender" and who identified each of those characteristics in Appellant.

(emphasis in State's brief). Ms. Coffel engaged Ms. Davin in the following colloquy in cross-examination:

Q: Nothing in your paper was specifically geared toward identifying risk or risk of re-offense?

A: That's correct.

Q: And you identified characteristics of the offender, is that correct?

A: Yes.

Q: But we have no way of knowing or no idea whether those characteristics have anything to do with whether a person will sexually violently reoffend, do we?

A: Correct.

(Tr. 138).

The State defends the probate court's judgment by supporting the use of clinical judgments in assessing risk (Resp. Br. 31-36). It suggests that Ms. Coffel has argued a lack of foundation for opinion based on clinical judgment, and that the Eastern District Court of Appeals concluded that psychologists cannot rely

on clinical judgment (Resp. Br. 31). The State offers ***In re the Detention of Thorell***, 72 P.3d 708 (Wash. 2003), to support the admissibility of clinical judgments (Resp. Br. 35-36).

In fact, Ms. Coffel has not argued that clinical judgments, in general, are inadmissible. She has argued that Dr. Phenix's clinical judgment *in this case* is not sufficiently probative to establish the State's case beyond a reasonable doubt. The State suggested in its argument that Ms. Coffel and the Eastern District relied only upon Ms. Coffel's witnesses (Resp. Br. 31). Whatever the Eastern District relied on is no longer relevant. And Ms. Coffel supported her argument with Dr. Phenix's admissions in cross-examination. Dr. Phenix admitted that clinical judgments are known to be inaccurate (Tr. 390). She admitted that they overestimate risk of reoffense (Tr. 390). She admitted that actuarials for male sex offenders were created specifically because of these deficiencies in clinical judgment (Tr. 390-391). Dr. Phenix admitted that studies show that clinical judgments are no more accurate than chance (Tr. 390). And she ultimately admitted that because of these deficiencies in clinical judgment "it is premature to make a judgment of how accurate we are with females." (Tr. 390).

The State's argument about the admissibility of clinical judgments obfuscates the genuine issue in this appeal, and its reliance on ***Barefoot v.***

Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) is inapposite. The question in ***Barefoot*** from where the State pulls its brief citation was whether clinical judgment is admissible at trial. 103 S.Ct. at 3396. In spite of the recognized shortcomings of clinical judgments, the United States Supreme Court found them to be admissible. ***Id***, at 396-398, 3401.

That is not the question in Ms. Coffel's case. The question is whether the probative value of Dr. Phenix's clinical judgment *in this case* is sufficient to establish the State's case beyond a reasonable doubt. The underlying facts in ***Barefoot*** are applicable to this question. One of the psychiatrists testified that he had performed "many" criminal evaluations and as the chief of psychiatric services in the state department of corrections he could observe the subjects of those evaluations to judge his accuracy. ***Id***., at 3407. The other psychiatrist testified that he had examined between thirty and forty thousand individuals. ***Id***. Both doctors diagnosed the defendant as a sociopath. ***Id***., at 3408. These facts are important to the decision of the United States Supreme Court to accept the admissibility of the testimony despite the inherent uncertainty of psychiatric evaluations. These facts are also important to why Dr. Phenix's clinical judgment of Ms. Coffel lacks sufficient probative value. The judgments of the psychiatrists in ***Barefoot*** were premised on a wealth of scientific information regarding

sociopaths and the prediction of future dangerousness from that condition. There is no similar scientific knowledge upon which Dr. Phenix could base her clinical judgment of Ms. Coffel's risk to reoffend in a sexually violent manner. In fact, Dr. Phenix, and every other expert at trial, admitted that such knowledge does not exist. As the ***Barefoot*** Court noted, "relevant, unprivileged evidence should be admitted, and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." 463 U.S. at 898, 103 S.Ct. at 3397. Just because the United States Supreme Court permitted clinical judgments based on extensive and accepted scientific knowledge to be admitted into evidence, does not mean that this Court must accept Dr. Phenix's clinical judgment totally lacking such knowledge as sufficient to deprive Ms. Coffel of her liberty.

Because the State failed to present sufficient evidence to prove beyond a reasonable doubt that Ms. Coffel has a mental abnormality making her more likely than not to engage in predatory acts of sexual violence unless she is confined in a secure facility, the judgment of the probate court must be reversed and Ms. Coffel must be released from confinement.

CONCLUSION

Because the State failed to prove, and the probate court failed to find that any existing mental abnormality caused Ms. Coffel "serious difficulty" controlling her behavior, as set out in Point I, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the State failed to prove that sexual sadism and alcohol abuse were mental abnormalities that will make Ms. Coffel more likely than not to commit predatory acts of sexual violence if not in a secure facility, as set out in Point II, the judgment of the probate court must be reversed and Ms. Coffel must be released from confinement. Because the State failed to present sufficient evidence to prove beyond a reasonable doubt that Ms. Coffel has a mental abnormality making her more likely than not to engage in predatory acts of sexual violence unless she is confined in a secure facility, as set out in Point III, the judgment of the probate court must be reversed and Ms. Coffel released from confinement. Because Section 632.495 fails to permit consideration of less restrictive alternatives to secure confinement and violates equal protection of the laws, as set out in Point IV, the probate court erred in failing to dismiss the petition filed against Ms. Coffel and the judgment must be reversed and Ms. Coffel released from confinement.

Respectfully submitted,

_____

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 4,114 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of _____, 2003, to Theodore A. Bruce, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

_____

Emmett D. Queener